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Supreme Court, U.S.
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No. 94-1414

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

THE MEAD CORPORATION,

Petitioner,

v.

BEAZER EAST, INC.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Court should exercise its extraordinary supervision to review a federal appellate court's interpretation of a private contract pursuant to state law.

RULE 29.1 STATEMENT

Through a chain of wholly-owned subsidiaries, Beazer East, Inc. ("Beazer") is ultimately wholly-owned by Hanson PLC. Beazer's wholly-owned subsidiary, the Teer Company, owns fifty percent (50%) of the American Stone Company.

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

Petitioner, The Mead Corporation, and its predecessor, the Woodward Corporation (collectively "Mead"), owned and operated the Woodward Coke Plant ("Coke Plant") as a coke and coke by-products manufacturing facility from the early 1900's until 1974. App. at A5.[1] On

[1] Mead's Petition for Writ of Certiorari will be cited herein as "Petition at ____." Citations to the decisions of the court of

[footnote continued]

October 31, 1974, Mead sold the Coke Plant to Beazer East, Inc., formerly known as Koppers Company, Inc. ("Beazer"), pursuant to an asset purchase agreement ("Agreement"). *Id.* On June 21, 1991, Beazer entered into an Administrative Order on Consent ("AOC") with the United States Environmental Protection Agency pursuant to which Beazer is conducting a site-wide environmental investigation of the Coke Plant. App. at A7.

Beazer initiated this action in 1991 to recover from Mead that portion of costs incurred, and to be incurred, in responding to environmental conditions at the Coke Plant which are fairly attributable to Mead's ownership and operation of the Coke Plant. *Id.* Mead has already been summarily adjudged by the district court to be a liable party pursuant to the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. §§9601-9675 ("CERCLA"),[2] App. at A36-38, a determination which Mead has not challenged at any stage of these appellate proceedings. The district court also determined that Beazer assumed Mead's CERCLA liability[3] pursuant to the Agreement, and dismissed Beazer's contribution claims against Mead. App. at A44-46.

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appeals and the district court, as well as the magistrate judge's report and recommendation, will be cited by reference to the Appendix to Mead's Petition in the form "App. at A____."

[2] All further citations to CERCLA will be to act section rather than the codified statute (*e.g.*, CERCLA Section 107 corresponds to 42 U.S.C. §9607).

[3] As used here, the terms "transfer" or "assume" with reference to "CERCLA liability" shall refer to private contractual agreements which shift financial responsibility *inter se* for the type of clean-up and remedial liabilities imposed on a current or former owner or operator's activities by CERCLA. *See* App. at A9.

On September 12, 1994, the Third Circuit Court of Appeals reversed, holding that Mead retained its CERCLA liability under the Agreement. The parties framed the issue on appeal as whether Beazer expressly agreed to assume, in the 1974 asset purchase transaction, the type of environmental liabilities which Congress imposed upon Mead in 1980 through CERCLA. In the Agreement, Beazer and Mead expressly delineated the liabilities of Mead that were assumed by Beazer and also agreed that Alabama law would govern interpretation of the contract. The court of appeals, applying Alabama law, simply interpreted the pertinent provisions of the Agreement to determine whether Mead had retained its CERCLA liability or whether Beazer had unambiguously assumed that liability. Concluding that the operative language did not, under applicable state law principles, transfer Mead's CERCLA liability to Beazer, the court of appeals reversed the decision of the district court and remanded the case for allocation of Mead's and Beazer's proportional shares of responsibility under CERCLA. A26-27. It is this routine interpretation of state contract law by the court of appeals which Mead now seeks to have reviewed by the Court.

ARGUMENT

I.
INTRODUCTION

The issue posited by Petitioner does not warrant a writ of certiorari because the United States Court of Appeals for the Third Circuit routinely exercised its appellate review in interpreting a private contract pursuant to state law. In order to reach that state law contract issue, the court of appeals did, however, sequen-

tially decide two questions of federal interest: (1) whether a contract which predates CERCLA can shift responsibility for CERCLA response costs as between private parties; and, (2) whether state law principles or federal common law should govern the interpretation and construction of private contracts which affect liabilities under CERCLA. Consistent with every other federal appellate court to have ruled on these issues,[4] the court of appeals held that private parties can contractually allocate responsibility *inter se* for CERCLA liability in a pre-CERCLA agreement, and that state law, in this case that of Alabama, supplies the rule of decision. App. at A9-10; A11-18. Mead does not challenge either of these holdings. Petition at 7-8. In its final analytical step, the court of appeals interpreted the Agreement between Beazer and Mead in accordance with Alabama law, and held that Beazer did not assume, and therefore did not agree to indemnify Mead against, Mead's CERCLA liability. App. at A18-A27. Accordingly, under Alabama law, Beazer and Mead each remain financially responsible for the environmental consequences of their respective actions in owning and operating the Coke Plant. App. at A27.

Since that contractual interpretation under Alabama law patently does not warrant issuance of a writ of certiorari, Mead attempts to somehow characterize the decision as one in which the court of appeals interpreted a federal statute contrary to its plain meaning. Specifically, Mead asserts that the court of appeals erroneously interpreted Section 107(e)(1) of CERCLA to mean that only "indemnity" agreements are effective as between

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[4]The court of appeals expressly avoided a "circuit conflict" and "join[ed] the other court of appeals." App. at A17.

private parties to transfer CERCLA liability.[5] Petition at 9-22. However, the court of appeals did not place such a limitation on CERCLA Section 107(e)(1). The court of appeals characterized "[t]he crux of the parties' agreement," App. at A20, as the interpretation of paragraph 4(c) of the Agreement. App. at A20-25. Likewise, Mead set forth the "Statement of the Case" in its papers below as "the narrow and straightforward issue of the interpretation of a contract."[6] This state law contract issue does not raise any important federal questions, does not create a conflict among the federal appellate courts, and does not raise any constitutional concerns. Thus, the only question actually presented is whether the Court should exercise its extraordinary supervision in a case which involves routine interpretation of a private contract pursuant to state law principles. Resort to this Court is clearly not warranted and, as such, Beazer respectfully requests this Court to deny Mead's Petition For Writ of Certiorari.

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[5] In attempting to convince the Court that there is a controlling distinction between "indemnity" and "hold harmless" agreements, Mead ignores the fundamental fact that the CERCLA liability at issue is imposed upon Mead by statute. App. at A3; A8; A37-38; *See Hatco Corp. v. W.R. Grace and Co.*, 801 F.Supp. 1309, 1321 (D.N.J. 1992). Whether by way of its indemnity-based counterclaim or by barring Beazer from seeking contribution for those costs expended pursuant to the AOC which are fairly allocable to Mead's activities, Mead ultimately seeks to shift financial responsibility for its statutory liability to Beazer. Mead is the only party in this case seeking to avoid the consequences of its own actions by shifting the ultimate responsibility to another, which is the essential nature of an indemnity claim irrespective of whether the claim is characterized as "hold harmless" or "indemnity."

[6] Brief for Appellee The Mead Corporation at 1, *Beazer East, Inc. v. The Mead Corporation*, 34 F.3d 206 (3d Cir. 1994) (No. 93-3372); Record at 15.

II.

THE ISSUE POSITED BY PETITIONER AS ITS "QUESTION PRESENTED" DOES NOT EXIST.

A. Since The Court of Appeals Held That Paragraph 4(c) Of The Agreement Did Not Transfer Mead's CERCLA Liability To Beazer, The Issue Framed By Mead Is Not Presented In This Case.

The issue framed by Mead in its Petition is not presented by this case. Mead's "Question Presented," Petition at i, depends entirely upon Mead's invalid assertion that the court of appeals held that a "release/hold harmless" agreement cannot, as a matter of statutory interpretation of Section 107(e)(1), insulate a party from a CERCLA contribution claim brought by the other party to that agreement. Petition at 12-13. That issue was not and cannot be reached in this case because it requires one to accept as true Mead's statement that "paragraph 4(c) makes clear that [Beazer] is assuming [Mead's CERCLA] liabilities." Petition at 13. Mead's presupposition is, however, the ultimate issue which was decided adversely to Mead by the court of appeals in holding that "paragraph 4(c) does not clearly state that Beazer has agreed to assume all liability for toxic wastes under present or future laws protecting the environment. . . . Accordingly, nothing in this agreement demonstrates a clear and unambiguous intent to transfer all CERCLA liability to Beazer." App. at A26-27. Having decided as a matter of Alabama contract law that Mead remains responsible for its CERCLA liability, the court of appeals never interpreted Section 107(e)(1) to determine whether only certain discrete categories of contracts can be effective to transfer CERCLA liability. In direct contrast to the issue presented by Mead, the court of appeals explicitly recognized that its review was limited

to a determination of whether the Agreement transferred *inter se* financial responsibility for Mead's CERCLA liability to Beazer under Alabama law. App. at A18-19. The court of appeals did not, either expressly or implicitly, limit the application of CERCLA Section 107(e)(1) to indemnity or any other discrete category of contractual provisions.

B. Neither The Court Of Appeals Nor Any Other Federal Appellate Court Has Limited CERCLA Section 107(e)(1) To Indemnity Agreements.

Mead asserts that the court of appeals erroneously interpreted Section 107(e)(1) of CERCLA to mean that only agreements of "indemnity," as opposed to "release/hold harmless," are effective to transfer CERCLA liability. Petition at 9-22. However, it was not incumbent on the court of appeals to address that issue.[7] Rather, the court of appeals properly resolved the contract interpretation issue framed by the parties and presented for resolution: whether Beazer assumed, pursuant to paragraph 4(c) of the Agreement, financial responsibility for the environmental consequences of Mead's operation of the Coke Plant for nearly seventy years. App. at A21, n.7. The court engaged in an analysis similar to that undertaken by every other federal appellate court that has addressed the issue[8] and held that the Agreement

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[7] Because the court of appeals decided that Beazer did not assume Mead's CERCLA liability pursuant to paragraph 4(c), it did not and could not have determined the issue posited by Mead due to the functional operation of the Agreement. The indemnity against and hold harmless from language appears in paragraph 8(b), pursuant to which Beazer agreed to indemnify and hold Mead harmless *only* for those liabilties expressly assumed in paragraph 4(c) or elsewhere in the Agreement.

[8] *See, e.g., Joslyn Mfg. Co. v. Koppers Co.*, 40 F.3d 750, 758 (5th Cir. 1994); *Fisher Development Co. v. Boise Cascade Corp.*,

[footnote continued]

could not be construed as an unambiguous manifestation of intent to transfer Mead's CERCLA liabilities. App. at A25-27. The court found the language of paragraph 4(c) to be "ambiguous under principles of Alabama law." *Id.* at A23. Contrary to Mead's assertion, neither the court of appeals, nor any other federal appellate court, has held that CERCLA's financial obligations may be transferred by private contract absent an unambiguous expression of intent to assume the obligation, irrespective of whether the particular agreement is characterized as being of release, indemnity, assumption, "hold harmless," or other label.[9]

Indeed, subsequent to the decision at issue, the court of appeals, in *Fisher Dev. Co. v. Boise Cascade Corp.*, 37 F.3d 104 (3d Cir. 1994), upheld a defensive assertion of a release provision under CERCLA. Rather than the limited assumption language at issue herein, the *Fisher* court was faced with a broadly-inclusive release which had been executed in order to settle a landlord-tenant dispute. 37 F.3d at 106-07. Consistent with its holding *sub judice,* the court of appeals, applying New Jersey law, determined that the release was broad enough to

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37 F.3d 104, 110 (3d Cir. 1994); *Kerr-McGee Chem. Corp. v. Lefton Iron & Metal Co.*, 14 F.3d 321, 326-28 (7th Cir. 1994); *Olin Corp. v. Consolidated Aluminum Corp.*, 5 F.3d 10, 15-16 (2d Cir. 1993); *John S. Boyd Co., Inc. v. Boston Gas Co.*, 992 F.2d 401, 406-07 (1st Cir. 1993); *Commander Oil Corp. v. Advance Food Service Equip.*, 991 F.2d 49, 52-55 (2d Cir. 1993); *AM International, Inc. v. International Forging Equip. Corp.*, 982 F.2d 989, 997 (6th Cir. 1993); *Mardan Corp. v. C.G.C. Music, Ltd.*, 804 F.2d 1454, 1461-63 (9th Cir. 1986).

[9] *See* cases collected at App. at A12 n.2; A24-25 and n.8 (the types of agreements in the cases collected by the court of appeals illustrate that the clarity of expression standard equally applies to agreements of settlement, assumption, release, indemnity, and otherwise).

"release *all claims* based on events occurring from 'the beginning of the world' to the date of the execution of the release," *id.* at 108 (emphasis added), thereby unambiguously encompassing CERCLA liability. 37 F.3d at 108-10 (citing to the decision below as reported at *Beazer East, Inc. v. The Mead Corp.*, 34 F.3d 206 (1994)). Comparison of the decision below to the *Fisher* opinion underscores that the characterization of or label affixed to a particular provision is in and of itself meaningless because the proper inquiry is whether the agreement transfers CERCLA liability pursuant to applicable state law.

III.
THE COURT OF APPEALS' DECISION DOES NOT PRESENT ANY OF THE RECOGNIZED BASES FOR CERTIORARI.

A. This Case Does Not Present An Important Question Of Federal Law Which Warrants Review By This Court.

A writ of certiorari may be properly issued when the court of appeals has decided an important question of federal law which has not been but should be settled by the Court. Supreme Court Rule 10.1(c). However, the Court does not grant a writ of certiorari for every academically interesting question. Rather, important questions of federal law must transcend the "academic or episodic." *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 79 (1955); *See also United States v. Standard Oil Co.*, 332 U.S. 301, 302 (1946). Further, the Court should only grant a writ of certiorari in cases "involving principles the settlement of which is of importance to the public, as distinguished from that of the parties." *Layne & Bowler Corp. v. Western Well Works,*

Inc., 261 U.S. 387, 393 (1923). The court of appeals' decision involved the application of well-settled principles of Alabama law to a dispute over the meaning of a provision in a private contract. This Court does not review routine interpretations or applications of state law by the federal appellate courts, particularly where, as here, Petition at 8 n.3, the petitioner does not contend that the court of appeals has erroneously interpreted the state law which it applied. *See, e.g., Richards v. United States,* 369 U.S. 1, 16 n.35 (1962).

B. The Decision Of The Court Of Appeals Does Not Create A Conflict Among The Federal Appellate Courts.

Mead, unable to forthrightly assert that the decision of the court of appeals creates a conflict among the federal appellate courts, instead mischaracterizes the effect of the decision as contributing to "confusion in the law among the circuits." App. at 14. In addition to being patently incorrect, "confusion" is not a recognized basis justifying this Court's review. A conflict worthy of this Court's consideration must be a real or intolerable conflict on the identical matter of law or fact, not merely an inconsistency *in dicta* or in the general principles utilized by the federal appellate courts. *See, e.g., United States v. Lorenzetti,* 467 U.S. 167 (1984) (granting certiorari in order to review a decision by the Third Circuit which expressly recognized that its interpretation of a statute was "squarely inconsistent" with a decision of the Sixth Circuit).

The court of appeals' decision does not create any conflict of law or fact, particularly since no other federal appellate court has differentially applied Alabama's contractual interpretation standards in the CERCLA

context, and the language of paragraph 4(c) has never before been the subject of judicial interpretation. Furthermore, the federal appellate cases cited by Mead in support of its "confusion" argument collectively stand for the developing yet discernable proposition of law that in order for a contract to transfer CERCLA liability, regardless of the label applied to the contract, it must contain language either specific enough to include CERCLA liability or broad enough to include any and all environmental liability. *See, e.g.,* App. at A10. *See also* cases collected at note 8, *supra.* Rather than creating "confusion," parties are guided by this general standard, subject to nuances which may exist in state law.[10]

C. The Court Of Appeals' Decision Presents No Constitutional Issue.

Although framed as an issue of statutory interpretation and application, Mead's Petition actually challenges the constitutionality of CERCLA – an issue which this Court has previously declined to consider. CERCLA Section 107(e) has repeatedly been adjudged not to violate constitutional due process rights, despite its retroactive effect. *See, e.g., United States v. Monsanto Co.,* 858 F.2d 160 (4th Cir. 1988), *cert. denied, Monsanto Co. v. United States,* 490 U.S. 1106 (1989); *United States v. Northeastern Pharm. & Chem. Co., Inc.,* 810

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[10]Mead is also incorrect when it asserts that the court of appeals' decision will significantly impair the ability of parties to contractually allocate environmental liabilities in real estate transactions. Petition at 3, 12, 17-18. CERCLA was enacted in 1980, and thereafter parties quickly learned how to allocate environmental legacies. The court of appeals' decision involves an agreement which predates CERCLA by six years.

F.2d 726 (8th Cir. 1986), *cert. denied, Northeastern Pharm. & Chem. Co., Inc. v. United States,* 484 U.S. 848 (1987).

Furthermore, Mead has waived any constitutional challenge by failing to raise it below. Mead admits that its constitutional argument is raised for the first time in its Petition although purportedly "because it was never foreseen that the Third Circuit would ignore the plain language of section 107(e)." Petition at 19. n.12. However, when Mead filed its Petition for Rehearing, it did not bring any constitutional issues to the attention of the court of appeals. Petition at 3 n.8. Such an overt omission should not be countenanced, particularly since absent exceptional circumstances this Court refrains from reviewing arguments which were not raised in the court of appeals. *Delta Airlines v. August,* 450 U.S. 346, 362 (1981); *Adickes v. Kress & Co.,* 398 U.S. 144, 147 n.2 (1970). This guideline continues to apply when the argument is characterized as involving constitutional due process violations. *See, e.g., G.D. Searle & Co. v. Cohn,* 455 U.S. 404, 412 n.7, 413-14 (1982); *DeShaney v. Winnebago County Dept. of Soc. Serv.,* 489 U.S. 189, 195 n.2 (1989).

D. The Court Of Appeals' Decision Promotes The Purpose And Policies Of CERCLA.

Contrary to Mead's assertion that the decision below does not promote the purposes of CERCLA, Petition at 21, this case is an exemplary model of both the "polluter pays" policy underlying CERCLA and of Congress' stated goal of encouraging private parties to initiate investigation and remediation of contaminated sites for which they do not bear full responsibility, with the *quid pro quo* being the ability to later exact contribution from

other responsible parties. *See, e.g.*, App. at A27, *citing to United States v. Alcan Aluminum Corp.*, 964 F.2d 252 (3d Cir. 1992). In fact, as the court of appeals recognized, its decision "leaves both Beazer and Mead responsible for their fair share of the cleanup costs associated with the Coke Plant. That result reinforces CERCLA policy." App. at A27.

The adoption of Mead's argument would actually frustrate the stated goals of CERCLA by providing a disincentive for potentially responsible parties to undertake privately-financed cleanups. Specifically, it is only that Beazer has taken affirmative steps to address the environmental consequences of its operation of the Coke Plant for fourteen years which presents Mead, an owner and operator of the Coke Plant for nearly seventy years, with the opportunity to now claim a differential standard for one seeking to be held harmless from CERCLA liability rather than being indemnified against it. Beazer acted in accordance with the central policy underlying CERCLA by entering into the AOC and incurring CERCLA response costs in investigating the environmental conditions existing at the Coke Plant. Had Beazer instead refused to act as a responsible corporate citizen, it is likely that the government, rather than Beazer, would have been forced to expend its resources to pursue the responsible parties, including Mead. Under those circumstances, Mead would be unable to argue, as it does today, that it was not affirmatively seeking indemnification.[11]

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[11] While not necessary to support a determination by this Court to deny certiorari, Beazer, pursuant to the obligations imposed by Supreme Court Rule 15.1, addresses the following additional misstatements of fact and law set forth in Mead's

[footnote continued]

CONCLUSION

For the foregoing reasons, Beazer respectfully requests this Court to deny Mead's Petition for Writ of Certiorari.

Respectfully submitted,

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Dated: March 24, 1995

Petition: (1) No Alabama court has passed on the issue of whether the doctrine of *caveat emptor* would effectuate the transfer of CERCLA liability pursuant to an "As-Is" provision. Petition at 6; (2) Neither the court of appeals nor the district court ever found that Beazer paid a reduced purchase price in exchange for assumption of any of the environmental liabilities at issue. Petition at 20; (3) If by asserting "Beazer already has been found liable to EPA," Petition at 21, Mead means that there has been an adjudication of liability against Beazer, Mead has made a misstatement of fact.